ON THE PRACTICABILITY OF CODIFYING ENGLISH LAW;

WITH

A SPECIMEN CODE OF THE LAW OF EVIDENCE.

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THE LAW OF EVIDENCE.

A Paper

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BY

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ON

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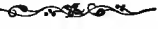

THERE is a very natural desire on the part of the public to have our laws simplified and condensed.

It is a legal maxim that everyone is supposed to know the law, and every person is visited with the consequences of his ignorance, and yet those who have spent their lives in the study of it are often obliged to confess their ignorance; and if anyone desires to know what is the law applicable to a particular state of circumstances, he is generally obliged to search through many volumes, and read and consider many decided cases. The written law is to be found at large in the volumes of the statutes, and the unwritten law is not collected in any authoritative form, but is to be looked for amongst the numerous volumes of reports of cases commencing from the very earliest times, and coming down to the present day, and which at present increase at the rate of six or eight volumes yearly. Now the public rebel in feeling against this state of things, and ask why the law cannot be contained in a short code, so that everyone by referring to it could learn what the law is. They entertain an idea that this vast complexity is created by members of the legal profession for their own interest, and that they purposely veil in mystery what might be plain and simple; but lawyers are really helpless and passive in this matter, every year a new volume of statutes is added to the existing body of the statute law, and almost every one of these affords the material for litigation, and gives rise to new cases in our reports—thus adding to the body of unwritten or judge-made law.

Pressed by public opinion, which is making itself felt upon this subject, our legislators have been struggling to find a remedy.

First, with respect to our statute law, it is proposed to digest it

and collect it into a convenient form, omitting such statutes as are useless, obsolete, and repealed. This is a very useful work, and is now in progress, and in the end it will considerably reduce the number of volumes to which we shall have to refer, in order to find out what the statute law is. It is also a work requiring great care and labour, and questions of great nicety arise as to the partial or total repeal of statutes. One of such questions gave rise to a discussion in the House of Commons last session between two distinguished legal Members of the House.

Into this part of the subject I do not propose to enter. I desire to consider what may be done to simplify and condense our unwritten law.

On the 22nd November, 1866, a Royal Commission was issued, directed to some of the most eminent judicial persons—and other men of distinguished ability—to enquire into the "expediency of a digest of law, and the best means of accomplishing that object, and of otherwise exhibiting in a compendious and accessible form the law as embodied in Judicial Decisions."

This Commission made its First Report on the 13th May, 1867. It presents a very clear picture of the work to be done with respect to the unwritten law. It says:—"The judicial decisions and dicta are dispersed through upwards of 1,300 volumes, comprising, as we estimate, nearly 100,000 cases, exclusive of about 150 volumes of Irish reports, which deal to a great extent with law common to England and Ireland. A large proportion of these cases are of no real value as sources or expositions of law at the present day. Many of them are obsolete, many have been made useless by subsequent statutes, by amendment of the law, repeal of the statutes on which the cases were decided, or otherwise; some have been reversed on appeal or over-ruled in principle; some are inconsistent with or contradictory to others; many are limited to particular facts or special states of circumstances furnishing no general rule." It then recommends a digest, correctly framed, and revised from time to time, as going far to remedy the evils pointed out. It thus defines a digest:—"A condensed summary of the law as it exists, arranged in systematic order under appropriate titles and subdivisions, and divided into distinct articles or propositions, which would be supported by references to the sources of law whence they were severally derived, and might be illustrated by citations of the principal instances in which the rules stated had been discussed or applied."

It then approves of the digest, and recommends that a portion of it, sufficient in extent to be a fair specimen of the whole, should be in the first instance prepared.

The Commissioners made their Second Report on the 11th May, 1870, in which they state what had been done in the interval. They employed three gentlemen of the bar to frame a digest of the law upon each of the following subjects: Mortgages, Easements, and Bills of Exchange. This report admits in substance that the experiment has failed. It states that the gentlemen whose assistance they have had have laid before them materials of considerable value, and have enabled them to form conclusions as to the conduct of the entire work.

"But we think it unadvisable to continue any further this mode of proceeding. We have found that the examination and revision of these materials, with that rigorous care and accuracy which would be requisite, would involve considerable further delay and expense; while on the other hand we have satisfied ourselves that these specimens would have again to be revised, and perhaps recast, when the time arrived for inserting them as portion of *a complete and systematic work.*"

Still they recommend the appointment of a commission of three persons to execute a digest as a whole. Mr. Justice Willes dissents from that report, and pronounces against the further prosecution of the digest, giving reasons in which I entirely concur. The last I have heard about the Commission is that they have been engaged in a litigation with one of the gentlemen employed to prepare the digest as to the amount of his remuneration. Nothing has been done to carry out the suggestions of appointing a paid commission to produce a digest, and I suppose the great probability is that this scheme will not be further proceeded with.

The only result of the process would be the slow and costly preparation of a number of text-books, which would in all probability not be better than those already published, and whose only utility would be that they might serve as materials for a code. The First Report states:—"The persons charged with the framing of the digest might be also entrusted with the duty of pointing out, from time to time, the conflicts, anomalies, and doubts, which in the course of their labours would appear. Thus the process of constructing the digest would be conducive to valuable amendments in the law. These amendments would be embodied in the digest in their proper places. Moreover, such a digest would be the best preparation for a code, if at any future time codification of the law be resolved on."

I would venture to say, in answer to this, that it is incurring a great and costly labour for no result. We have already admirable treatises and digests of the law, and every intelligent text-writer does exactly what the commissioners suggest should be done by the framers of the digest—they point out anomalies, regret that some rules were ever laid down which are now established by decided cases, and only to be overthrown by the House of Lords when the point arises. Judges have, in like manner, lamented the existence of certain doctrines, so firmly established that they are not at liberty to over-rule them.

The essential difference between a Digest and a Code is, that the digest collates all the law as it is, good and bad, while the code declares prospectively what the law is to be. A code should embody the leading principles established by decisions which practice and experience have shown to be sound and wise—rejecting wholly those which are bad, and which reason and experience condemn, and introducing such improvements and amendments of the existing law as are required.

Mr. Justice Willes, in expressing his dissent from the Second Report, puts the matter in a very clear point of view. "A code is preferable to a digest in many points of view. A digest gathers

and compiles what has been decided or deemed, and amongst other relics it will preserve the conflict of Common Law and Chancery, and the rest; whereas a code must once and for all lay down uniform rules of justice to govern every court. Thus, a code will swallow up at once mischiefs of detail, the instances of which would choke a digest. A really well-considered code, not restricted to a digest of our own jurisprudence, but embodying improvements suggested by a comparison of our own laws with those of other countries, might contribute to the gradual formation of international, mercantile, and maritime law." This suggestion, of not only rejecting in a code such parts of our own law as are unsound, or not adapted to the present state of society, but of introducing such parts of the laws of other countries as are deserving of adoption, is one that should never be lost sight of by the framers of a code. Thus a code, if properly carried out, and stamped with legislative sanction, would reduce the mass of unwritten law to some simple formulæ, would by positive rules get rid of useless and injurious matter which now deforms our law, and would borrow rules from other systems of jurisprudence and engraft them upon our own.

The very mode in which our system of law has grown into its present shape, demonstrates the utility and necessity of such a process of purgation, as distinguished from one of mere collation. It has grown slowly, adapting itself, as well as it could, to the growth of society and advance of civilization; but still necessarily retaining much both of the form and substance of the early period of its existence—based to a great extent upon principles and maxims which were good in their day, but which are not applicable to the circumstances of modern society. Take an illustration of this from the law of contracts. The two classes of contracts, according to our law, are contracts under seal, and simple contracts; a written agreement is a parol contract because it is not sealed. Our ancestors could not write, but could use a seal, which was essential to the validity of a deed or other solemn instrument; and a contract not under seal was considered the same as a mere verbal contract, though it was reduced to writing and signed; hence have arisen chapters of law as to recitals and estoppels, and as to the mode of varying instruments under seal. Thus, if there be a receipt for money in the body of a deed, you are not allowed in a Court of law to show it was not paid; and if there be a written agreement varying or discharging a contract under seal, you cannot rely on this in a Court of law, but must seek relief in Equity, because there is a legal maxim—*Nihil tam conveniens est naturali æquitati unumquodque dissolvi eodem ligamine quo ligatum est.*

If we were now codifying the law of contracts, the division would be into written and verbal contracts, and written ones would be divided into those which required to be executed in presence of witnesses, and those which do not require any attestation; and we should thus get rid of all these absurd distinctions.

Is it then possible to have this work done? Does the complex chararcter of our mixed law, and the multiplicity of decisions and *dicta* impose an insuperable obstacle in the way of evolving order

from this chaos. I think not. Let us not attempt the impossible task of providing by a code in terms for every case that may arise. A code can only lay down general principles, leaving to the judges to decide upon their application to the facts of particular cases as they arise; accordingly, the existence of a code does not prevent the future accumulation of cases, readings, and commentaries. In all cases where a code has been adopted this has been so—in the Roman Law, in the Code Napoleon, and many others. But it strikes me that we have greater facility for codifying than if we had no system of law existing, and were framing a new code of laws for a new country. We have the decisions and dicta of wise and learned men, the masters of our law, laying down the true principles of the law. These principles we may express in the code in language which has already received a judicial interpretation; and thus, so far from flinging aside, we can utilize the wisdom of our ancestors, and elicit from the decisions the true rules which are thus converted from unwritten into written law.

One great excuse for not doing anything is, that it is part of a large scheme, and that you cannot do any part unless you are prepared to do all. For instance, what was proposed by the Digest Commission was a complete and systematic work. We might none of us live to see this *magnum opus* completed, and when completed, it would not be what we wanted. The advantage of codification is that we may proceed by steps, we can codify one branch of the law, and then another, and another; and try how the experiment succeeds.

It seems but reasonable, when a person asserts that such a work is practicable, to put him to the test, and ask him to furnish, in writing, an illustration of the mode in which the work may be carried out.

Accepting this test, I have prepared a Code of the Law of Evidence, which I venture to submit as a *specimen*. It will be printed at the end of this paper; and I invite the fullest criticism upon it. I am conscious that it will be found to have faults and imperfections, and I claim no merit for it save as it is an attempt to show that a difficult problem is capable of solution.

Of course I shall not now enter into the details of it; they can be studied and canvassed by those who understand the subject; but it is quite necessary to preface it with some explanatory observations, and to justify and vindicate some of the proposals which I have made.

Our law adopted the maxim that "no one ought to be a witness in his own cause;" and it was the law down to the year 1851, that no plaintiff or defendant could be examined as a witness. Our ancestors thought it more important that men should not be placed in a position which would make them subject to a strong temptation to commit perjury, than that the truth should be discovered. We are indebted to the same principle for the Statute of Frauds and Perjuries, under which certain agreements cannot be enforced unless all the terms of them are in writing. It is said that it cost a subsidy to settle its meaning, and the decisions upon it would fill many volumes, and yet it is very questionable whether it has not been more successful in preventing the doing of justice than the committing of fraud. The principle of excluding evidence pervaded

our law. I recollect with what horror most lawyers regarded the innovation of allowing plaintiffs to be called as witnesses, and how they struggled against it in every way. Now we can hardly realize to ourselves how for centuries a law was tolerated, the result of which was that a plaintiff could not recover a demand unless he could afford to keep a clerk or shopman as a witness, and that when a fraudulent claim was made against a defendant he could not be examined in disproof of it.

Bentham's Rationale of Judicial Evidence happened to fall in my way just as I was commencing to study law; it made an impression upon me which has not faded, and during my professional life I have seen the principles which he advocated struggling for the mastery, and gradually triumphing over the prejudices of lawyers and the timidity of legislators. If I might sum up these principles in a sentence they would be, *that all evidence relevant to the issue should be admitted, reserving all objections to its weight.* What a striking testimony to the soundness of these principles is borne by the Legislature, when in the year 1869, in the act 32 and 33 Vict., c. 68, it is recited, "That the discovery of truth in Courts of Justice has been signally promoted by the removal of the restrictions on the admissibility of witnesses." In this act almost the last restraint upon the examination of parties is removed, by making the parties to any action for breach of promise of marriage competent to give evidence; and yet, as showing the timidity of our legislators, and the lingering influence of old prejudices, it is clogged with a condition that no plaintiff in any such action shall recover a verdict, unless their testimony shall be corroborated by some other material evidence in support of such promise. No such rule exists in reference to the proof in any other civil action; it is borrowed from the rule of our criminal law, which does not allow the testimony of an accomplice to be the ground of a conviction, unless corroborated. The introduction of such paltry exceptions is one of the reproaches of our law. This statute may give rise to a chapter of decisions as to what amounts to corroboration in such an action.

A code of the law of evidence should reject all unmeaning and trivial exceptions, and lay down the broad rule that no witness should be incompetent by reason of being a party or having any interest in the suit, or for any other reason.

There is, however, a matter of vast importance to be determined, viz., whether the same rule should not extend to criminal proceedings. The proposed code deals with this question by providing as follows: —"Any person who in any criminal proceedings is charged with the commission of an indictable offence, or any offence punishable by summary conviction, shall be competent, but not compellable, to give evidence for himself, and if examined shall be subject to cross examination as any other witness."

This is a proposition which will encounter great opposition, and therefore I am desirous of stating fully my reasons for making it.

In all judicial investigations the *discovery of truth* should be the great object. The question is, would that be promoted by the introduction of this rule? I have no doubt that it would, and there-

fore I propose it. What is the course of events now which we frequently see in reference to a criminal trial? A man is tried on a criminal charge; the witnesses for the prosecution tell their story; the prisoner's mouth is closed; he may be the only person who by a statement of the facts could clear his own character; but he cannot be heard. It sometimes happens that after a conviction thus obtained circumstances transpire which lead the executive government to believe that there was a false case made. He is discharged. A prosecution for perjury is instituted against the witnesses in the former case; and they are convicted upon the evidence of the late convict, coupled with other evidence and the circumstances of the case as they now appear. May we not truly say that in this case the man is the victim of an unjust law? He has been committed and been in prison, because he was not allowed to tell his own story, and it is a poor atonement to him that his prosecutors are punished by the result of another prosecution and his character at last cleared. The consequences to him may have been ruinous, and cannot be undone. Now what is the position of the juries in both of these cases, who are required to give a true verdict? Neither jury is allowed to hear the *whole case*, only *half* of it. The first jury were not allowed to hear the accused man, and the second jury, in like manner, are not allowed to hear the former witnesses then arraigned for perjury. Could any system be devised better calculated to prevent the discovery of the truth? I must confess that when I hear the point pressed upon juries by prisoner's counsel with great force, "Gentlemen, my client's mouth is closed; if the prisoner were allowed to speak he would clear up this matter;" and then the jury are asked to assume a certain state of things to have occurred, of which there may be no evidence, but which it is suggested the prisoner's evidence, if received, would have established, I say whenever I hear this, I inwardly deplore a state of the law which tends to keep back the truth. At the same time, I neither overlook nor despise the arguments that may be adduced on the other side, and I have endeavoured to weigh them fairly. It is said an accused man is placed in such a position that the temptation to swear falsely, in order to screen himself, is such that he ought not to be placed in that position, and that an oath taken by a person in that position would not have the usual sanction. That is to some extent true; but it is only the same kind of argument that was used against the admissibility of parties, or persons having a strong interest, as witnesses—their temptation to take a false oath in order to carry the cause in which they had the interest. But the answer is the same—all such objections should be to the *weight* not to the *admissibility* of the evidence. The old law excluded a man, no matter how trifling his interest was; and under it a shareholder in a joint stock bank could not have been examined for the bank to prove a fact in an ordinary commercial case, although his interest in its result could not be the thousandth part of a farthing. Now that plaintiffs and defendants, and interested parties, are admitted as witnesses, many different degrees of weight are to be attached to the interested evidence according to the circumstances; in the case put there could be no weight whatsoever against the evidence; but in

other cases the interest might be so strong, and the circumstances such, that a tribunal would be disposed to attach scarcely any weight at all to the testimony of the interested witness. So in the case of prisoners, if allowed to be examined, there are cases in which the tribunal could attach little weight to the exculpatory oath of the accused; but there are also cases in which it would weigh considerably. In the case of a person really innocent it can hardly be doubted that his evidence would often be of the first importance, and if on cross examination his story continued to be consistent, and truthful, it might be conclusive in his favour. But it is said and said truly, that with respect to persons really guilty, it would operate very unfavourably, for if the prisoner were not examined, the jury would draw an unfavourable inference against him, and if he were, he might be exposed to the rigour of a searching cross examination, and substantially be compelled to convict himself. True; but if the discovery of truth be the object, do not all these supply strong arguments in favour of the change? I disapprove of the French system of interrogating the prisoner; but the true medium lies between that system and ours, viz.: to allow the prisoner to explain on oath, if he desires, the circumstances of the case, and in that case *only* to subject him to interrogation.

Another instance in our criminal law of the desire to withhold full knowledge from a jury, is afforded by the rule as to previous convictions. The law attaches a severer punishment on the commission of certain offences if the party has been previously convicted; but in arraigning a prisoner in such a case, the fact of the previous conviction is kept back from the jury, who are required to try the prisoner for the offence without knowing that he had been previously convicted of a similar offence. I observe that Mr. Justice Willes referred to this rule lately as one that should be altered, and I entirely agree with him. Even in cases where there is not an indictment founded on a previous conviction, the judge generally has in the calendar before him a history of all the previous career of crime and the number of convictions; but the jury must be kept in the dark upon that matter. I recollect a case tried before me of a respectable-looking man charged with picking a pocket at a race course. The prosecutor positively swore to him as the man who took his watch; but there was a crowd, and he had only a moment to identify him; and when he was taken prisoner no watch was found with him. His appearance and demeanour were good, and his manner plausible, and the jury hesitated much before they convicted him. After his conviction, when I stated what appeared upon the calendar as to his previous history, I saw a smile on the faces of the jury, and some of them obviously suggested to the doubting juror how little room there was for his doubts. Our criminal law was in many respects very harsh towards the accused person. Until the Prisoners' Counsel Act was passed, he could not have the advantage of a speech from his advocate. Severe punishments, often capital, were imposed upon trifling offences against property. This unjust harshness appears to have led to the introduction, as a counterpoise to it,

of certain rules highly favourable to the accused, of which this is an instance, and there are many others.

Again, there is a rule excluding hearsay evidence, which was intended to exclude common report or rumour, but which prevents proof being given of what was said by a third person. The existence of this rule renders it impossible for a witness to describe a transaction as it really occurred. He is proceeding with his narrative, and says he met A. B., who said to him.—— He is immediately interrupted, and warned that he is not to tell what A. B. said. This puzzles him greatly—why he should not tell what was said to him; but the judge sternly tells him, in the language of a high authority, "what the soldier said is not evidence," and thereupon the counsel examining him proceeds, "in consequence of something the soldier said to you, which you are not at liberty to mention, what did you do?"

What is said is often just as important as what is done, and I never could understand why the whole narrative should not be admitted. This point arose in a remarkable manner in the Tichborne case, where a witness was asked what was said to him by the claimant or some other person whom he met in Australia, and the question was objected to; but I do not think the point was actually decided. But could anything be more calculated to throw light upon the case, than if the witness met a shipwrecked sailor in Australia, and he had told that he and seven others had escaped from the wreck of the *Bella*, and had just been landed? There is danger of such evidence being fabricated, but if genuine it is often the very best evidence, and therefore I propose that all evidence of the class should be admitted—leaving the tribunal to judge of its weight.

Another rule of the law of evidence was animadverted upon in the same case, viz:—that if any piece of evidence, no matter how unimportant, be admitted, and the other party except to its admission, and it be held that it was inadmissible—then, although it could not have had the slightest effect upon the result, the whole of the proceedings fail, and the verdict will be set aside. The Chief Justice appealed to the Attorney-General as a legislator to correct this evil; but he naturally deprecated an appeal to him in that character. Now, a very simple clause in the proposed code (No. 18,) removes that objection, I have taken it from the Indian code of civil procedure. Thus what has been long felt to be a reproach to our law would disappear.

I do not think it is necessary for me here to enter into fuller detail of the clauses which I have introduced into this specimen code. I do not claim for it perfection or completeness. My aim has been to give a practical proof that the codification of the English law is not an impracticable or hopeless task. Many persons will, I have no doubt, say that it is impossible that the forty clauses contained in this specimen code, could nearly exhaust the unwritten law of evidence, and that it is therefore imperfect and incomplete. I certainly have not embodied in this short compass the result of all the decisions in the books on the law of evidence. I have not introduced the law of evidence as regards the proofs necessary to sustain particular actions, dealing only with the general rules applicable to the mode of proof;

nor have I adverted to the rule as to not allowing written instruments to be varied or explained by parol evidence, for this relates more properly to a code of the law of contracts. In like manner the question of explaining ambiguities in documents by evidence of user or acts of ownership is excluded for the same reason.

I must again repeat what I believe to be the true office of a code—to put in writing such parts of the unwritten law as are deserving of being preserved in our jurisprudence, omitting those which are trivial or ephemeral, and abolishing those which are faulty. Where the code is silent, the existing decisions must be referred to as authorities, and they illustrate and explain the meaning of the code. Nor would a code abrogate the provisions of the statute law on the same subject, unless they are inconsistent with its clauses, though it will necessarily supersede many of them by expressing in a simple form the result of several Acts. Thus, when we provide that all persons who conscientiously object to taking an oath may take a solemn affirmation, we dispense with various acts passed to allow Quakers, Moravians, and others, to affirm.

I particularly dwell upon these points, because I believe that the making of a code so complete and exhaustive that we might burn all our books, would be simply impracticable, even were it desirable. M. Portalis, one of the framers of the Code Napoleon, thus expresses himself:—"We have guarded against the dangerous ambition of wishing to regulate and to foresee everything. The wants of society are so varied, the intercourse between men is so active, their interests so multifarious, and their relations so extended, that it is impossible for the legislator to provide for every emergency. The office of the law is to fix by enlarged views the general maxims of right and wrong, to establish principles fruitful in consequences, and not to descend to the details of all questions which may arise upon each particular topic. It is for the magistrate and jurisconsult, penetrated with the general spirit of the law, to direct their application."

We have great wealth of learning in decided cases; we should not throw it away, but utilize it. Let us then be content with the humbler task of simplification and expurgation.

It may be said that I have not taken a fair test, for that the law of evidence is, perhaps, the branch of our law which affords the greatest facilities for codification—and that may be so; but I will add that it is the one pre-eminently in which a code would be of immediate practical benefit. I believe, however, that the law of contracts, of bills of exchange, and other distinct branches, are capable of being dealt with in the same way, if approached in the direction indicated by Mr. Justice Willes, and thus gradually our entire law might be codified.

I must, however, acknowledge that the law of real property in its present state scarcely admits of codification, and any attempt to do it would, I think, convince the person who attempted it of the necessity of a radical reform in that branch of law. This is too large a question to enter upon at present; it may form the subject of another paper; it is enough to say, that as several of the obvious changes involve not merely changes in the law, but important social and polit-

ical questions, the work of the legislator must, in this branch, precede that of the code-maker.

In conclusion, I shall only say that the fusion of our courts of law and equity can only be effected by establishing an uniform code binding upon all courts. When that is done, the distinction between the nature of cases may still render it advisable, as a division of labour, to leave to different courts the decision of certain classes of cases for which their procedure may be specially adapted. The law in all courts would then be the same, but there would be distinct codes of procedure, according to the nature of the case forming the subject of litigation.

If it were thought desirable to proceed in this way with the various branches of our law, and if the Legislature were disposed to consider and sanction such codes by prospectively declaring them to be law, I have no doubt that many would be found amongst our jurists, possessing an accurate knowledge of the law as it is, and an enlightened view as to what it ought to be, who would be willing to devote their energies to the completion of parts of this great work.

PROPOSED CODE

OF

THE LAW OF EVIDENCE.

Whereas, it is expedient to simplify the Law of Evidence; Be it enacted, etc., as follows :—

I.

All witnesses shall, before they are examined, take an oath or solemn affirmation.

II.

The oath shall be administered in such form as the witness shall consider to be binding upon his conscience.

III.

Any witness who has a conscientious objection to the taking of an oath, may take a solemn affirmation in the form or to the effect following :—

"I, A.B., do solemnly promise and declare that the evidence given by me to the court, shall be the truth, the whole truth, and nothing but the truth."

IV.

Any witness taking a solemn affirmation shall be subject to the same consequences in all respects as if he had taken an oath.

V.

No person shall be excluded as a witness by reason of want of religious belief, if he is ready to take a solemn affirmation.

VI.

The following persons only shall be incompetent to testify :

a. Children of tender years, who appear to the judge incapable of understanding the nature of an oath or solemn affirmation.

b. Persons of unsound mind, who appear to the judge incapable of giving rational evidence.

VII.

No person shall be rejected as a witness by reason of his being a party to the cause or matter, nor by reason of his having any interest direct or indirect in the result.

VIII.

Any person who in any criminal proceeding is charged with the commission of an indictable offence, or any offence punishable by summary conviction, shall be competent, but not compellable, to give evidence for himself; and if examined, shall be subject to cross-examination as any other witness.

IX.

Any party to a civil suit, or other proceeding of a civil nature, shall be competent, and may be compelled, to give evidence as a witness therein, and also to produce any document in his possession or power, in the same manner as if he were not a party to the suit or proceeding.

X.

Husbands and wives shall in every proceeding, both civil and criminal, be competent and compellable to give evidence for or against each other. Provided that any communication made by husband or wife to the other during their marriage, shall be deemed a privileged communication, and shall not be disclosed without the consent of the party making the same, unless such communication shall relate to a matter in dispute in a suit pending between husband and wife.

XI.

A barrister, solicitor, attorney, or clergyman of any religious persuasion, shall not be bound to disclose any communication made to him confidentially in his professional character, without the consent of the person making the same.

XII.

A witness shall not be excused from answering any question relevant to the matter in issue, in any civil or criminal proceeding, upon the ground that the answer to such question may tend directly or indirectly to criminate such witness, or expose him to any penalty or forfeiture. Provided that no answer which a witness shall be compelled to give, shall be used against such witness in any criminal proceeding, or in any proceeding for a penalty or forfeiture.

XIII.

Evidence shall not be rejected on the ground that it consists of conversations with, or statements made by, third parties, in case in the opinion of the judge they shall be material, and relevant to the issue.

XIV.

The judge shall reject all evidence which is irrelevant to the issue.

XV.

Every person produced as a witness shall be subject to be cross-examined by the opposite party, or, at the discretion of the judge, by the party producing him.

XVI.

A witness on cross-examination may be asked any question relevant to the issue, or any question which, though not relevant to the issue, goes to impeach the credit of the witness, subject to the discretion of the judge as to the allowance of such last-mentioned questions.

XVII.

A party may produce evidence to contradict the answers of a witness given upon cross-examination, as to matters not strictly relevant to the issue, in case the judge shall think that such evidence is material to the merits of the case.

XVIII.

The improper admission or rejection of evidence shall not be ground of itself for a new trial, or for the reversal of any decision in any case, if it shall appear to the court before whom such objection is raised, that independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that if the rejected evidence had been received it ought not to have varied the decision.

XIX.

Any entry or statement which would be admissible in evidence after the death of the person who made it, on the ground of having been against interest, or made in the ordinary course of business, shall be admissible, though the person making it be not dead, if he is incapable of giving evidence by reason of his subsequent loss of understanding, or is *bonâ fide* and permanently beyond the reach of the process of the Court, or cannot after diligent search be found.

XX.

Books proved to have been regularly kept in the course of business, or in any public office, shall be admissible as corroborative, but not as independent, proof of the facts stated therein.

XXI.

The judge may take judicial notice of all matters of public notoriety.

XXII.

In cases of pedigree the declarations of illegitimate members of the family, and of those intimately acquainted with the family, shall be admissible in evidence after the death of the declarant.

XXIII.

No declaration shall be excluded on the ground that it was made after a controversy had arisen, such objection shall only go to the weight of the evidence.

XXIV.

The contents of an instrument in writing must be proved by the production of the writing, except in the following cases :

If it be shown to the satisfaction of the judge :

a. That it is destroyed or cannot after proper search be found ;

b. That the production of the writing is physically impossible or highly inconvenient ;

c. That it is in the possession or power of the opposite party, who refuses to produce it at the trial though called on to do so ;

d. That it is in the hands of a third party who is not compellable to produce it, and who refuses to produce it though called on so to do ;

e. That it is in the hands of a person residing out of the reach of the process of the Court, and that all reasonable efforts have been made to obtain its production.

XXV.

A receipt, whether signed or under seal, shall not be conclusive evidence of payment, but may be explained.

XXVI.

A witness shall not be bound to produce any document in his possession not relevant or material to the case of the party requiring

its production, nor any confidential writing or correspondence which may have passed between him and any legal professional adviser.

XXVII.

A witness, whether a party or not, shall not be bound to answer any question or produce any document relating to affairs of state, the answer to which if given, or the production of which, would be contrary to public policy.

XXVIII.

A witness shall be allowed to refresh his memory by any writing made by himself, or by any other person at the time when the fact occurred, or shortly afterwards, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing. In such case the writing shall be produced, and may be seen by the adverse party, who may cross-examine the witness upon it.

XXIX.

Whenever a witness may refresh his memory by reference to any document, he may, with the permission of the judge, refer to a copy of said document—provided the judge, under the circumstances, be satisfied that there is sufficient reason for the non-production of the original.

XXX.

On matters of public history, literature, science, or art, it shall be lawful to refer for the purposes of evidence to such published books, maps, or charts, as the judge shall consider to be of authority on the subject to which they relate.

XXXI.

Books printed or published under the authority of the government of a foreign country, and purporting to contain the statutes, code, or other written law of such country, and also printed and published books of reports of decisions of the courts of such country, and books proved to be commonly admitted in such courts as evidence of the law of such country, and written opinions of persons skilled in the law of such country, shall be admissible as evidence of the law of such foreign country.

XXXII.

It shall be the duty of the judge to direct the jury as to the existence and nature of the law of a foreign country when same is in issue.

XXXIII.

When dying declarations are evidence, they shall be received if it be proved that the deceased was, at the time of making the declaration, and then thought himself to be, in danger of approaching death, though he entertained at the time of making it hopes of recovery.

XXXIV.

No person shall be convicted on the testimony of an accomplice alone, unless such testimony be corroborated in some material particulars, and the judge shall direct the jury whether there is such corroboration.

XXXV.

Confessions shall be received in evidence, unless they appear to the judge to have been made under the influence of fear produced by threats.

XXXVI.

A confession alone will not be sufficient to warrant a conviction, without additional proof that the offence charged has been committed.

XXXVII.

Where an indictment contains a charge of a previous conviction, the prisoner shall be arraigned upon the whole indictment; and if he pleads not guilty, the previous conviction may be given in evidence upon the trial.

XXXVIII.

An impression of a document made by a copying machine shall be taken, *primâ facie*, to be a correct copy.

XXXIX.

All maps made under the authority of government, or of any public municipal body, and not made for the purpose of any litigated question, shall, *primâ facie*, be deemed to be correct, and shall be admitted in evidence without further proof.

XL.

Nothing in this act contained shall be construed so as to render inadmissible any evidence which, but for the passing of this act,

would have been admissible; nor shall it be construed to alter or affect any rule of law or practice which is not inconsistent with the provisions herein contained.

XLI.

This act shall come into operation on the ——— day of ——— and shall not extend to Scotland.